

Issue – Forestry - Riparian Protections

The State of Oregon does not have management measures on forestry lands that adequately protect riparian areas of medium, small and non-fish bearing streams, including intermittent streams, to ensure attainment of water quality standards and full beneficial use support.

The Oregon Board of Forestry needs to revise its Oregon Forest Practices Act and/or establish implementation rules that provide greater riparian protections of medium, small and non-fish bearing streams. While the States Attorney General has determined that the Oregon Department of Environmental Quality has the authority to establish controls beyond the authorities of the Oregon Department of Forestry, to protect water quality and beneficial uses as provided within its responsibility under the CWA, ODEQ has chosen not to do so.

Many members of the Oregon Board of Forestry recognize a need for and support a rules change. The Governor's Office also recognizes that a rules change is needed. Not all of the Board members are supportive of a rule change and, instead, would prefer to change the State's water quality standard, (Protecting Cold Water Criterion), which is the standard often exceeded when ODF rules are implemented on the ground.

NOAA/EPA must find that the State Oregon CNPCP does not contain management measures that adequately protect riparian areas of medium, small and non-fish bearing streams, including intermittent streams, to ensure attainment of water quality standards and full beneficial use support.

Background

NOAA/EPA's January 13, 1998 letter to the State

In NOAA/EPA's January 13, 1998 letter to the State, the agencies identified areas where existing practices under Oregon's Forest Practices Act and Oregon's Forest Practices Rules should be strengthened to attain water quality standards and fully support beneficial uses. These areas included:

- ***Protections for medium, small and non-fish bearing streams, including intermittent streams;***
- Protections for areas at high risk for landslides;
- The ability of forest practices to address cumulative impacts of forestry activities;
- Road density and maintenance, particularly on so-called legacy roads; and
- The adequacy of stream buffers for application of certain chemicals.

Significance of the Issue

Specific to riparian protections our letter stated that:

"Under existing State forest practices, medium, small and non-fish bearing streams may be subject to loss of sediment retention capacity, increases in delivery of fine sediments, and increases in temperature due to loss of riparian vegetation. Another concern is provision of adequate long-term supplies of large woody debris in medium, small and non-fish bearing streams, a shortage of which can

result in decreased sediment storage in upstream tributaries, increased transport and deposition downstream and overall adverse impacts to beneficial uses.

NOAA/EPA also addressed “cumulative effects” in that correspondence:

“Cumulative effects of increased water temperature, sediment transport, road density, hydrological modification, and other factors can manifest themselves at a larger system scale and have adverse effects over an entire watershed or basin, rather than at a particular site or stream reach. The scope and pattern of these types of effects have recently become much more apparent through the use of watershed and landscape analysis. Cumulative effects are a concern not only within the forestry sector but across all land use or management measure categories within a watershed.”

NOAA/EPA’s April 12, 2004 the State

NOAA/EPA determined that Oregon had not yet fully satisfied the condition requiring the State to identify and begin applying additional management measures for forestry in several areas critical to water quality protection.

October 2004

EPA testifies at the BOF meeting for greater protections for supporting additional changes to riparian protections and for landslides.

November 2005

EPA testifies at the BOF supporting rule concepts.

June 2008 Interim Letter to DEQ and DLCD

- Still did not have forestry mms to address riparian concerns
- Also recommended that EQC to petition the BOF to initiate a “Basin Rule” change review to address inadequacies in the FPA management measures that are contributing to violations of water quality standards. The BOF cannot terminate the Basin Rule change review without the concurrence of the EQC. The Basin Rule change provision has not been used by the EQC.

January 2009 – NWEA sues NOAA and EPA

August 2009 letter to DEQ and DLCD – follow up to a June 17, 2009 conference call with DEQ and DLCD regarding approaches for addressing outstanding issues. Letter indicates that

- Oregon’s forestry program lacks adequate measures for protecting riparian areas of medium, small and non-fish bearing streams;

October 2009 DEQ submits draft approach to use IR TMDL approach

May 2010 NOAA/EPA supports DEQ approach

July 2010 State DOJ indicates State has authority to implement forestry provisions

September 2010 NWEA’s and NOAA/EPA sign settlement agreement

2011 DEQ asks for extension to do IR TMDL

2011 RipStream study findings come out – like cause of temperature increases due to shade loss

2012 EPA testifies at BOF to encourage rule changes for small and medium F streams and greater protections for type N streams

April 2012 kick-off for Mid-Coast IR /TMDL

Dec 2012 – “Christmas” Letter from NOAA/EPA to State reiterating conditions of settlement agreement

Feb 2013 – “Valentine Letter from State to NOAA/EPA indicating that State will not meet the schedule for developing the TMDL

December 20, 2013 Proposed Decision Letter

- NOAA/EPA stated that Oregon relies on both regulatory and voluntary measures to provide riparian protections for medium and small fish bearing streams and non-fish bearing streams;
- NOAA/EPA proposed that these measures are not adequate to protect water quality and beneficial uses;
- NOAA/EPA indicate that RipStream, Sufficiency Analysis and the IMST document the need for greater protections;
- The BOF has authority to make rule changes and until rule changes are adopted, the federal agencies cannot consider them in place;
- State must also adopt protections for Type N streams.

Key Points

- Analysis of the RipStream Study found that timber harvest on private forest lands, under the OR Forest Practices Act did not meet the State water quality standard, Protection of Cold Water Criterion (PCW), on 44% of the streams harvested on private forest lands. Timber harvest under State Forest plan requirements met PCW. Most private and State sites had larger no cut buffers than required.
- RipStream study determined likely cause of stream temperature increases to be shade loss. Canopy levels and tree height associated with shade loss. ODF is using this study to demonstrate the need for riparian rule changes to the OFP regulations for medium and small fish bearing streams.
- Some of the unpublished results from the BOF supported study, the Paired Watershed Study, are being presented by the timber industry as indicating that the FP Rules are fine but PCW is not needed or wrong. Attacking the PCW is the industries key position for convincing the BOF not to provide greater protections for M&S fish streams. Some of the BOF members support this position while others do not. Providing comments on the paired watershed study that go against industry’s interpretation of the unpublished data, seems to be a “lightening rod” for debate on this issue. Nonetheless, the paired watershed study was referenced extensively in State’s submittal in response to NOAA/EPA’s proposed decision, and, therefore will warrant a thorough response from NOAA/EPA.
- Recent presentations to the Environmental Quality Commission (the governing body for ODEQ) on the results of the paired watershed study and on the value/importance of PCW, appeared to convince the EQC that a water quality standard’s change is not needed.

Actions in the State on this Issue

- Based on findings from RipStream, Sufficiency Analysis and IMST, ODF has been working on a riparian rule analysis to determine if rule changes are needed for medium and small fish streams
- Because of recent turnover on the Oregon Board of Forestry (BOF), the BOF held a workshop to better inform new BOF members of the current data showing the water quality and beneficial use impacts of the current forest practice rules;
- Timber Industry representatives and others presented initial findings from the Paired Watershed Study in attempt to show the FP rules were ok while the State's PCW standard was not.
- DEQ along with ODFW, EPA and NMFS presented background information and data on the value and importance of the PCW
- While not all members are supportive, the BOF agreed to move forward with the riparian rule analysis
- ODF is building rule options; options to be presented to the Board in September;
- Focus will be on M&S Type F streams – not considering Type N streams;
- ODF will be considering data from Paired Watershed studies.

Note: Governor's Office recognizes a change is needed

The Population group (Family Foresters) most likely to be impacted the

greatest is well aware of the BOF's interest in establishing new rules for M&S F streams

Issue – Impacts, Constraints and Risks of not resolving the issue

Impacts

- *Family Foresters* – There are 87,000 family forests in the 1-9 acre size, and 69,000 family forests in the 10-500 acre size representing about 4 million acres of forest lands. Larger riparian buffers on private forest lands reduce the amount of timber that can be harvested and could greatly impact their economic return from these lands for these owners.
- *Ecological* - We have known for over 15 years that ODF Rules do not support water quality standards or beneficial uses. Greater buffers are needed to protect water quality and support beneficial uses.

Constraints/Challenges

- *Scope of the State Proposed Riparian Rule Changes* – The State is focusing on rule changes for Medium and Small Fish bearing streams only. The State is not looking at a rule change for Type N streams. "Greater buffer protections for Type N" streams is one of the outstanding issues needing to be addressed.
- *Uncertainty in Content of the Rule Change* – Although the State is focused on M&S Type F streams, it is still unknown if, how and where the rules will be applied.
- *Record for Review* - The record for review in making our decision closed when the comment period on our proposed decision closed. The BOF process for rule change is ongoing. There is a slim chance the BOF Rule making process will be completed by the time NOAA/EPA makes its final decision. If, by chance, the State does adopt rule changes before our final decision is made, would we open the record to allow for the State's action to be considered in our decision?
- *Paired Watershed Study* – The Paired Watershed Study is a study supported, in part, by the Board of Forestry. The forest industry is using data from this study to try to show how forest practice rules are fine, as is, and how the real problem is the Protecting Water Quality Criterion (PCW). The study is not complete. Much of the scientific data generated from the study have

not been published. “Negative” comments on the Paired Watershed Study seem to be a lightning rod for debate.

Conclusions

From 1998 to 2013 NOAA/EPA continued to find that Oregon’s forestry program lacked adequate management measures for protecting riparian areas of medium, small and non-fish bearing streams;

- Public comments on NOAA/EPA’s proposed decision did not provide adequate information to show that the State’s existing management measures were protective of the M&S fish bearing streams and the Type N streams.
- BOF’s continuation of its riparian rule analysis process indicates that the State recognizes greater protections are needed for the M&S fish bearing streams.
- BOF is silent on the needs for Type N streams.
- The BOF rule making process will likely extend beyond the deadline for NOAA/EPA to issue a final CZARA decision.
- If the BOF rule making does precede the deadline for the CZARA decision, the rule making will not likely contain protections for Type N streams. There is also uncertainty on how the revised rule would be applied.

Recommendation:

By January 30, 2015, NOAA/EPA should make a decision that the State’s CNPCP does not contain management measures that adequately protect riparian areas of medium, small and non-fish bearing streams, including intermittent streams.

Note: NOAA/EPA may change the scope of the decision if the BOF establishes rules to provide better protections for M&S fish bearing streams before NOAA/EPA issue its final decision. However, NOAA/EPA will still find that State’s CNPCP does not contain management measures that adequately protect riparian areas of non-fish bearing streams.